Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent,

vs.

RONALD WOODRUM,

Petitioner.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the seizure by police of a taxicab passenger "on bare suspicion" is reasonable under the Fourth Amendment solely because the taxicab company participates in a Police Department sponsored program authorizing random police stops of cabs for the purpose of ensuring the cabdriver's safety.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Ronald Woodrum respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above proceeding on January 20, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 202 F.3d 1, and is reprinted in the Appendix hereto at 1a, infra. The opinion dissenting from the denial of the petition for rehearing en banc by an equally divided Court is reported at 208 F.3d 8, and is reprinted in the Appendix at 29a.

The Findings of Fact, Rulings of Law, and Order on Defendant's Motion to Suppress has not been reported, and is reprinted in the Appendix at 39a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 2000, App. 25a, and the Orders of the Court denying rehearing and rehearing en banc were entered on April 6, 2000. App. 26a-27a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was arrested on January 22, 1998, after two Boston police officers stopped the taxicab in which he was riding as a passenger and discovered that he was in possession of a firearm and crack cocaine. Although the police officers claimed they reasonably suspected petitioner of having been involved in a recent shooting, the court below held that the stop did not violate the Fourth Amendment because the owner of the cab had consented to the stop by virtue of his participation in a voluntary Boston Police Department program designed to ensure cabdriver safety, and that his consent could be imputed to both the cabdriver and the passenger.

This program, originally called "Operation Taxi," was promulgated in 1991 by the Boston police commissioner as a result of a rash of serious crimes against cab drivers. The special order issued by the commissioner "actively encouraged" uniformed and plainclothes officers to "make frequent stops of taxicabs for the purpose of checking on the operator's safety." The stops were to be made "when, and wherever necessary, particularly during the evening and early morning hours," with special attention given to "isolated and high crime areas." Commonwealth v. Cosme, 1994 WL 8879664, at *1 (Mass. Super. Ct. May 9, 1994).

A series of state court decisions, however, held that Operation Taxi violated the Fourth Amendment because the decision to stop the taxis was left to the "unbridled discretion of the police officer," and the program did not meet "standard, neutral guidelines conducted pursuant to a plan devised in advance by law enforcement supervisory personnel." Id. at *4; see also Commonwealth v. Carle, 1995

WL 737537 at *3 (Mass. Super. Ct. Oct. 31, 1995); Commonwealth v. Bland, 1994 WL 879833 at *3-*4 (Mass. Super. Ct. Aug. 23, 1994).

In response to these decisions, the police commissioner issued an order on September 3, 1996, implementing a new program known as the Taxi Inspection Program for Safety (TIPS). TIPS created a "partnership with members of the taxi industry" and directed the Hackney Carriage Unit of the Police Department to register taxi owners in a "voluntary program" in which participating members would affix decals to the rear side windows and in a conspicuous location in the rear passenger compartment of their cabs.[1/] Each decal states (in English and Spanish): "THIS VEHICLE MAY BE STOPPED AND VISUALLY INSPECTED BY THE BOSTON POLICE AT ANY TIME TO ENSURE DRIVER'S SAFETY." App. 52a.

According to the police commissioner's order, "[b]oth uniform and plainclothes personnel are encouraged to make frequent stops of taxicabs which are displaying the above decals for the purpose of checking on the operator's safety." The order continued:

> Stops should be conducted when and wherever necessary, particularly during the evening and early morning hours. Attention will be given to isolated and high crime areas. Taxi drivers are not to be detained longer than is necessary

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[1/] According to the Hackney Carriage Unit of the Boston Police Department, "there are 1719 licensed taxicabs in the City of Boston and all 1719 licensed taxicabs voluntarily participate in TIPS." App. 53a.

to check on the welfare of the operator. Passengers in occupied taxis are to be given a brief explanation of the purpose of the stop: **Operator Safety**.

Id. at 50a. Other than the quoted language, no guidance was provided to police officers as to what taxis to stop or where and when to stop them. That decision was left completely to the discretion of the officers in the field.

Shortly after midnight on January 22, 1998, Boston police sergeants Stephen Meade and Eric Bulman heard a radio call reporting a person with a gunshot wound near the intersection of Columbia Rd. and Washington St., a densely populated area of Boston's Dorchester section known as Grove Hall. On the way to the location of the victim, the officers heard a second radio bulletin reporting two officers in foot pursuit of an individual in the vicinity of Castlegate Rd. and Blue Hill Ave., several blocks from the location of the shooting victim. Meade and Bulman proceeded to this location, where they entered a building on Blue Hill Ave. and assisted in an arrest related to a drug transaction and not to the earlier shooting.

After helping to secure the scene of the arrest, Meade and Bulman remained in front of the building on Blue Hill Ave., some 40 feet from the corner of Castlegate Rd. At approximately 12:45 a.m., thirty-five minutes after hearing the report of the shooting, they noticed a taxicab on Castlegate Rd. approaching and stopping at the intersection with Blue Hill Ave. Although it was dark inside the cab, the officers observed what they thought was a black male -- petitioner Ronald Woodrum -- wearing a stocking cap and possibly sunglasses, seated in the right rear of the cab. As the

cab turned right onto Blue Hill Ave., the passenger looked in the direction of the police officers and "appeared to slouch down back into the right corner of the taxi and lower himself as the taxi pulled out onto Blue."

Believing the passenger might have been involved in the shooting that had occurred in the same general vicinity a half hour earlier, Meade and Bulman decided to follow and stop the taxicab. Meade testified that other than the fact the passenger "slouched down toward his right," he had no reason to suspect he was involved in the shooting or he was in the possession of a gun or drugs. Although the officers had observed the TIPS decals on the taxicab, Meade testified that the "suspicious" movement by the passenger was the reason the cab was stopped, and that they would have stopped it regardless of the TIPS program.

The officers, who were in plain clothes and an unmarked car, followed the cab for about a block, activated the cruiser's blue lights, and pulled the cab over to the side of the street. As they walked toward the cab, the officers observed the passenger's left shoulder come up, his right shoulder dip down, and his head move toward the left. Upon reaching the cab, Meade opened the rear passenger-side door and Bulman opened the rear driver-side door. Using their flashlights, they saw petitioner with a beer bottle in his left hand and his right hand hidden under his jacket. At this point, the officers ordered petitioner to exit the cab, and as he did so, a holstered revolver fell to the ground. Petitioner was then arrested and taken to the station for booking, where a subsequent search turned up a small quantity of crack cocaine and a pipe. It was also determined that petitioner was not a suspect in the earlier shooting.

In due course, petitioner was indicted for being a felon in possession of a firearm and ammunition, and with possessing cocaine base with intent to distribute. See 18 U.S.C. §922(g)(1); 21 U.S.C. §841(a)(1). Petitioner moved to suppress the physical evidence seized as a result of the stop, as well as evidence of incriminating statements made during his detention. Following an evidentiary hearing, the district court denied the motion for two reasons. First, the court held that the "one and only exceptional fact" of petitioner sliding out of view when the cab in which he was riding turned the corner was "in the circumstantial mix sufficient to justify a solid suspicion that some type of criminal activity was afoot." App. 44a. Thus, the court concluded that the belief by the police officers that petitioner did not want to be seen by the police was, in and of itself, sufficient under the circumstances to justify the detention of a citizen "who by happenstance found himself at a late hour in the vicinity of Castlegate Road and Blue Hill Avenue in the aftermath of a crime . . ." Id.

The district court also held that the TIPS program provided a separate and independent basis for determining that the stop of the cab in which petitioner was riding was lawful because of "the consent given by the taxi driver to the random stop of his cab by the Boston Police." App. 45a. Reasoning that a driver of a cab "certainly had the authority to consent to its search over the objection of his passenger," the court concluded that the cab driver could, and did, consent to the stop of the cab regardless of the its impact upon petitioner, the passenger. Id.[2/]

[2/] Petitioner entered a conditional guilty plea to reduced charges, reserving the right to appeal the denial of his suppression motion, see

Recognizing that the appeal raised "a novel constitutional question" requiring it to "travers[e] uncharted Fourth Amendment waters" App. 2a, the Court of Appeals held that the police stop, "on bare suspicion," of the taxicab in which petitioner was a passenger passed constitutional muster. App. 2a. Although it noted that "reasonable suspicion presents a question that can be argued persuasively either way," id. at 10a, the court elected "to forgo resolution of the reasonable-suspicion inquiry." Id. at 11a. Instead, it concluded that the seizure of petitioner did not violate the Fourth Amendment because "a police officer's stop of a taxicab displaying TIPS decals for the purposes of checking on the driver's safety is reasonably justified by the owner's consent, notwithstanding the presence of a passenger in the cab who has not given any express consent." Id. at 21a.

On April 6, 2000, a petition for rehearing was denied, and a suggestion for rehearing en banc was denied by an equally divided court. In an opinion, joined in part by Torruella, Ch. J. and by Lipez, C.J., Circuit Judge Lynch dissented from the denial of rehearing en banc because "the case has great constitutional and societal significance . . . and there is reason to doubt that the opinion is correctly decided." App. 28a. According to Judge Lynch, "[t]his case is important, not just for the development of Fourth Amendment law, but also for the quality of life in urban areas and the protection of individual rights." Id. Furthermore, by upholding the seizure of a cab passenger because of the consent of the owner of the cab, "the panel approves a new and questionable Fourth Amendment doctrine of irrevocable

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Fed. R. Crim. P. 11(a)(2), and was sentenced to twenty-seven months imprisonment.

anticipatory consent to seizure (and third party consent at that)." App. 36a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FIRST CIRCUIT UPHOLDING THE SEIZURE OF A TAXI PASSENGER IN THE ABSENCE OF REASONABLE SUSPICION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH A DECISION OF THE NEW YORK COURT OF APPEALS.

It is well established in this Court's jurisprudence that the police must establish some reasonable, individualized suspicion for any seizure of the person, except in the case of routinized, fleeting and nonintrusive encounters conducted pursuant to established regulatory programs. See United States v. Martinez-Fuente, 428 U.S. 568 (1976); Camara v. Municipal Court, 387 U.S. 523 (1967). The decision of the court below makes a dangerous inroad in this principle.

In Delaware v. Prouse, 440 U.S. 648 (1979), this Court held that a program of random stops of motorists to check drivers' licenses and registration, where there was no articulable and reasonable suspicion of any violation of the law, violated the Fourth Amendment because it would subject every vehicle on the road to a seizure "at the unbridled discretion of law enforcement officials." Id. at 661. Quoting from Terry v. Ohio, 392 U.S. 392 1, 22 (1968), the Court went on to explain that:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular

> automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches..."

Delaware v. Prouse, 440 U.S. at 661. The Court did indicate, but did not decide, that other methods of spot checks that involve less intrusion or do not involve unconstrained exercise of discretion, such as "[q]uestioning of all on-coming traffic at road-block type stops" might satisfy constitutional requirements. Id. at 663.

This Court did uphold the constitutionality of such fixed checkpoints or roadblocks set up to detect drunken drivers in Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), and illegal aliens in United States v. Martinez-Fuente, 428 U.S. 543 (1976), so long as they involve no more than "an initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." Sitz, 496 U.S. at 450-51. In concluding that these checkpoints do not violate the Fourth Amendment even though the officers do not have probable cause or a warrant for the seizure, the Court focused on the lack of discretion afforded to individual, uniformed officers who stop every approaching vehicle, the standardized procedures employed, and the minimal intrusion imposed on motorists. Id. at 453-54.

The TIPS program has every evil associated with the practice this Court struck down in Prouse, and none of the safeguards the Court required for even a fixed checkpoint stop in Sitz. Boston police officers, regardless of whether in plain clothes or in uniform, are given completely unbridled discretion to stop any taxicab, regardless of whether occupied

or not, "when and wherever necessary." There are no written guidelines or standards governing the specific location, frequency or manner in which the stops are to be conducted. Rather than a limitation on discretion, the direction that police officers give particular attention to making stops in "isolated and high crime areas" encourages them to target minority communities and engage in racial profiling. See Commonwealth v. Cosme, 1994 WL 879664 at *3 (Mass. Super. Ct.)("[t]he random stopping of young black men in Roxbury and Dorchester can easily be analogized to the random stopping of cabs"). Finally, there is no established training for police officers under the TIPS program, nor is there any apparent oversight of the program to insure that it is being conducted fairly and in a neutral manner.

The decision of the court below upholding the constitutionality of the TIPS program is in direct conflict with a decision of highest court of the State of New York. In In re Muhammad F., 94 N.Y.2d 136, 700 N.Y.S.2d 77 (1999), petition for cert. filed sub. nom. New York v. Muhammad F., 68 U.S.L.W. 3577 (Mar. 14, 2000)(No.99-1443), the New York Court of Appeals held that a stop of a taxicab pursuant to a New York City program similar to TIPS constituted a seizure of the passenger in violation of the Fourth Amendment. Under the Taxi and Livery Robbery Inspection Program (TRIP), police officers in plain clothes, unmarked cars and on a roving patrol, were authorized to make suspicionless stops of livery vehicles for the purpose of giving the drivers crime prevention information and making an assessment of whether the driver was in danger. The court concluded that the police had failed "either to establish the reasonableness of the patrol stops here under the three-pronged balancing test of Brown v. Texas [443 U.S. 47 (1979)] or to satisfy the constitutional requirement that the

stops were 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' (id. at 51)."

While the New York court did not doubt the importance of the governmental interest in protecting taxicab drivers, it noted that, as in the present case, the prosecution "failed to submit any empirical evidence that this type of patrol stop -- as opposed to fixed checkpoint stops by uniformed officers in marked cars -- was a reasonably effective means of furthering the State interest in reducing violent crimes against taxi drivers," or to show "the unavailability of less intrusive or discretionary means to prevent violent crime directed at the drivers of livery vehicles." Id. at 136. And, as in the present case, "given that the police chose the locations of the stops because they were high taxi-crime areas, the occupants' first reaction might well have been fear that they were being car jacked or mugged." Id. Finally, the court concluded that the vague and conclusory testimony of police officers that they were instructed not to stop taxis "arbitrarily" did not sufficiently mitigate the constitutional infirmity of "standardless and unconstrained discretion" of "the official in the field." Id., quoting from Delaware v. Prouse, 440 U.S. at 661.

At a time when racial profiling is a national scandal, this Court should review the decision of the court below which significantly weakens constitutional limitations on the exercise of discretion by police officers.

II. THE RADICAL EXPANSION BY THE COURT BELOW OF THE DOCTRINE OF THIRD PARTY CONSENT SUBSTANTIALLY WEAKENS THE PROTECTION OF THE FOURTH AMENDMENT.

Certiorari should be granted to review the First Circuit's adoption of a novel constitutional doctrine that permits a taxicab company to consent to the seizure of a passenger in its cab. The court below reasoned that the agreement of a cab owner to enroll his cab in the TIPS program and to display TIPS decals constituted his voluntary consent to suspicionless police stops of the cab for the purpose of checking on the driver's safety. Moreover, since the owner of the cab acted on the driver's behalf as well as his own, "[t]his identity of interests permits us to attribute the owner's consent to the employee in this case." App. 15a.[3/]

This Court has long approved consensual searches of areas in which a person has a reasonable expectation of privacy "because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." Florida v. Jimeno, 500 U.S. 248, 250-251 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.")

[3/] Since there is no support in the record for the court's conclusion that the cab driver was an employee of the owner rather than an independent contractor, there was no basis for its attribution of the owner's supposed consent to the driver on the theory that the owner/employer had any "employment related duty to provide a safe workplace for his drivers." App. 15a n.2.

When the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has "the burden of proving that the consent was, in fact, freely and voluntarily given." Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

In some circumstances, moreover, voluntary consent to a search may be established by a showing "that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171 (1974). Common authority cannot be implied from a mere property interest the third party may have in the property. Id. at 171 n.7. Rather, it depends "on mutual use of the property by persons having joint access or control for most purposes, so that it is reasonable to recognize that any one of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Id.

As the court below conceded, there is no authority from this Court or elsewhere for its novel extension of the principle of third party consent from searches of property to seizures of persons. App. 17a. Equally unprecedented is the court's conclusion that the consent of the owner of property can be attributed to an unconsenting employee merely because of an "identity of interests." App. 15a.

Nor is there any logical basis for the court's conclusion that the third party consent of the cab owner amounts to consent by the passenger to being stopped, seized and visually inspected by police in the absence of any reasonable suspicion of criminal activity. Neither the owner nor the driver of a cab have any common authority over the

person of a passenger. Although the driver of the cab may retain authority with respect to the technical driving decisions on a trip he has been engaged to make, this authority in no way extends either to the person of the passenger or to the space which the passenger occupies. United States v. Santiago, 950 F.Supp. 590, 598 (S.D.N.Y. 1996)(A passenger in a cab has a reasonable expectation of privacy protected by the Fourth Amendment because "[t]here is no question that the rear seat of the taxicab belongs exclusively to the passenger for the duration of the ride for which he hired the cab.")

The relationship between the driver and a passenger, moreover, is not like the common authority and control of roommates, as in Matlock, where persons living together reasonably understand that each may consent to the presence of outsiders on the premises. In Stoner v. California, 376 U.S. 483, 489 (1964), this Court held that even though a person who engages a hotel room undoubtedly gives permission to maids, janitors and repairmen to enter his room in the performance of their duties, he does not authorize the desk clerk to permit the police to search his room. Similarly, a person who hires a taxicab has a reasonable expectation of privacy in the passenger compartment of the cab for the duration of the trip, and does not, as the court below concluded, assume the risk that the driver may consent to his being detained by the police in order to make sure he is not a dangerous criminal. App. 18a.[4/] See Bond v. United States,

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[4/] The court below correctly did not seek to rest its decision on the ground that petitioner had impliedly consented to his detention when he entered a cab with TIPS decals affixed. As the Seventh Circuit has said, "[c]ourts confronted with claims of implied consent have been reluctant to uphold a warrantless search based simply on actions taken in

__ U.S.__, 120 S.Ct. 1462 (2000)(although a bus passenger clearly expects that his carry-on bag may be handled, he does not expect that a law enforcement officer will manipulate it in an exploratory manner).

The court's radical expansion of the doctrine of third party consent has widespread and dangerous implications for the rights protected by the Fourth Amendment. Its logic would permit, as the dissenters below suggested, the owner of a hotel to "consent to the search of hotel rooms occupied by guests through the owner's voluntary participation in a program that authorized police to enter the rooms at their discretion to protect the cleaning staff or to prevent theft of hotel property." App. 35a. Cf., Edmund v. Goldsmith, 183 F.3d 659, 664 (7th Cir. 1999), cert. granted sub nom. Indianapolis v. Edmund, 68 U.S.L.W. 3519 (Feb. 22, 2000)(No. 99-1030)(holding that a drug roadblock set up to discover evidence of crime was a wholesale invasion of privacy in violation of the Fourth Amendment).

Only recently this Court refused to the relax Fourth Amendment standards to permit investigatory stops based on bare-boned tips about firearms. Florida v. J.L., _ U.S. __, 68 U.S.L.W. 4236 (Mar. 28, 2000). The approval by the court below of random, suspicionless investigatory stops on the

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light of a posted notice." McGann v. Northeast Illinois Regional Commuter R.R. Corp., 8 F.3d 1174, 1180 (7th Cir. 1993). Moreover, since every taxi in Boston was enrolled in the TIPS program, petitioner had no real choice if he wished to use the only form of public transportation that was available in the early morning hours. Clearly, he cannot be said to have freely and voluntarily waived his constitutional right to be free from unreasonable seizures under such circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-249 (1973).

basis of third party consent constitutes a far greater erosion of the guarantees of the Fourth Amendment.

III. THE TIPS PROGRAM CONSTITUTES STATE ACTION IN VIOLATION OF THE FOURTH AMENDMENT.

There is an even more fundamental reason that the supposed consent of the owner of the cab cannot justify a roving, suspicionless TIPS stop that would otherwise clearly violate the Fourth Amendment under Prouse and Sitz. As the court below recognized, taxicab stops under the predecessor of the TIPS program had been held by a number of state trial judges to violate the Fourth Amendment. App. 2a-3a. Rather than attempt to correct the constitutional flaws in the program, however, the Boston police commissioner merely issued an order that directed the Hackney Carriage Unit of the Police Department to register taxi owners in a "voluntary program" in which participating members would affix TIPS decals in their cabs, and encouraged "[b]oth uniform and plain clothes personnel . . . to make frequent stops of taxis which are displaying the above decals for the purpose of checking on the operator's safety." App. 50a.

Government cannot circumvent the mandate of the Fourth Amendment by the expedient of entering into a "partnership" with a private party to accomplish what it is constitutionally barred from doing on its own. It is well established that "[a]lthough the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989). As this

Court noted, "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." Id. at 615. Thus, in Skinner, this Court held that breath and urine tests voluntarily required by private railroads without any governmental compulsion nevertheless were subject to Fourth Amendment scrutiny because "the Government did more than adopt a passive position toward the underlying private conduct." Id. Rather, "the Government's encouragement, endorsement and participation suffice to implicate the Fourth Amendment." Id. at 615-616.

In the present case, it is plain the taxi owners were acting on behalf of the Police Department when they agreed to participate in a program of random, roving, suspicionless stops that the police had been barred from carrying out on their own. Like the railroads, taxicabs are common carriers which require a specific license to operate, they perform an essential public function, and they are subject to extensive regulation. See Town Taxi, Inc. v. Police Comm'r of Boston, 377 Mass. 576 (1979); Hathaway v. Checker Taxi Co., 321 Mass. 406 (1947). And as in the case of the railroads, the government did not take a "passive position" toward the seizures authorized by the TIPS program. On the contrary, the "encouragement, endorsement and participation" by the Boston Police Department in the TIPS program is more than sufficient to require its compliance with the Fourth Amendment. The Boston Police can no more avoid the Fourth Amendment's prohibition of roving, suspicionless motor vehicle stops by enlisting the cooperation of the taxi industry, than the Southern States could avoid the Fourteenth Amendment's prohibition against racial discrimination in voting by the use of privately run primary elections. See Smith v. Allwright, 321 U.S. 649 (1944).

CONCLUSION

The evil of the TIPS program is that it subjects every citizen traveling in a cab in Boston to seizure upon the basis of the unbridled and standardless discretion of police officers. It makes all citizens fair game for groundless investigatory stops, and it permits selective law enforcement practices and "racial profiling" to go unchallenged. This Court should, therefore, grant certiorari to review the decision of the court below sanctioning this unprecedented erosion of a citizen's Fourth Amendment right to be secure in his person.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 99-1697

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD WOODRUM,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Richard G. Stearns, U.S. District Judge]

Before

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
and Boudin, Circuit Judge.

Jonathan Shapiro, with whom Noel Richardson and Stern, Shapiro, Weissberg & Garin, were on brief, for appellant.

Patrick M. Hamilton, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, and John A. Wortmann, Jr., Assistant United States Attorney, were on brief, for the United States.

January 20, 2000

SELYA, Circuit Judge. This appeal raises a novel constitutional question. After traversing uncharted Fourth Amendment waters, we affirm the trial court's denial of a passenger's motion to suppress evidence gleaned as a result of a police stop, on bare suspicion, of a taxicab enrolled in a voluntary Boston Police Department (BPD) program designed to ensure cabdriver safety.

I. BACKGROUND

Understanding this case requires familiarity with both the BPD's Taxi Inspection Program for Safety (TIPS) and the events surrounding the traffic stop. We treat these topics separately.

A. The Program.

In 1991, responding to safety concerns accentuated by two recent murders, Boston's police commissioner promulgated an executive order that instituted "Operation Taxi." In terms, the order "actively encouraged" police officers "to make frequent stops of taxicabs for the purpose of checking on the operator's safety," especially after dark and in high-crime areas. In the order's aftermath, however, a number of state trial judges ruled that stops made pursuant to

Operation Taxi violated the constitutional proscription against unreasonable searches and seizures. See U.S. Const. amend. IV. Rather than throw out the baby with the bath water, the BPD reconfigured the program in an effort to meet the courts' objections.

The police commissioner launched the new program, nicknamed TIPS, on September 3, 1996. The promulgating order made taxi owners' participation voluntary and assigned responsibility for enrolling acquiescent owners to the BPD's Hackney Carriage Unit. Owners who opted to participate were given decals and told to affix one to each of the cab's rear side windows and a third in a conspicuous location in the rear passenger compartment. Each decal is four by five inches in size, with a bright red border, and bears the BPD shield. Each states in block print (in English and Spanish): "THIS VEHICLE MAY BE STOPPED AND VISUALLY INSPECTED BY THE BOSTON POLICE AT ANY TIME TO ENSURE DRIVER'S SAFETY." The words "PUBLIC NOTICE" appear in enlarged letters above this statement and the words "BOSTON POLICE TAXI INSPECTION PROGRAM FOR SAFETY" appear in enlarged letters below. TIPS differs from its predecessor program in these two respects: voluntary participation and deployment of identifying decals.

The police commissioner's order instructed uniformed and plainclothes personnel to make frequent stops of taxis that featured the decals to check on the operators' safety. The order continued:

> Stops should be conducted when and wherever necessary, particularly during the evening and early morning hours. Attention will be given

to isolated and high crime areas. Taxi drivers are not to be detained longer than is necessary to check on the welfare of the operator. Passengers in occupied taxis are to be given a brief explanation of the purpose of the stop: **Operator Safety**. A Taxi Inspection Program for Safety form (BPD form 1833, revised 8/96) ... shall be completed at the time of the stop.

B. <u>The Stop and its Aftermath</u>.

TIPS was in effect shortly after midnight on January 22, 1998, when police sergeants Stephen Meade and Eric Bulman heard a report of a shooting near the intersection of Columbia Rd. and Washington St. in the Grove Hall section of Dorchester (a high-crime neighborhood). The officers, who were in plainclothes, drove toward that intersection in an unmarked car to offer assistance. As they neared their destination, they heard a second radio bulletin: two police officers, on foot, were pursuing an individual in the vicinity of Castlegate Rd. and Blue Hill Ave. Meade and Bulman drove there instead - the locus was only a few blocks away from the site of the reported shooting - and discovered that their fellow officers had cornered the object of their pursuit inside a building on Blue Hill Ave. The pursuing officers arrested the individual, informing Meade and Bulman that the arrest related to a drug transaction rather than to the recent shooting.

Meade and Bulman began walking toward their car at approximately 12:40 am (a half-hour after they had heard the report of the shooting). As they stood on the sidewalk, they saw a cab pull up to the corner and stop before making a right

turn from Castlegate Rd. The officers noticed a passenger - defendant-appellant Ronald Woodrum - on the far side of the rear seat. He glanced in their direction and then slouched down.

Thinking that the passenger might be the perpetrator of the earlier shooting, Meade and Bulman decided to follow the taxi. They trailed the vehicle for about a block, observing that the passenger sat up straight once it had turned the corner. The officers then decided to stop the cab. They have testified that, although they were aware of the TIPS decals, their primary concern was the shooting investigation.

The officers flashed their lights and the taxi pulled to the side of the road. As Meade and Bulman walked toward it, they could see the appellant's right shoulder go up and his left shoulder dip as he glanced down toward the left. Based on these movements, the officers suspected that the appellant was secreting a weapon inside his coat. They flanked the cab and shined flashlights into the back seat. Meade could see that the appellant's right hand was moving around inside his coat. Meade opened the rear door closest to where Woodrum was seated, and Bulman opened the opposite door.

The appellant immediately started to protest that all he had was a beer. When he reached into his left jacket pocket with his left hand, Bulman told him not to take anything out of his coat and to put his hands in plain view. Notwithstanding this admonition, the appellant kept his right hand under his coat; Meade, concerned for his safety, directed the appellant to step outside. He grudgingly complied. When he freed his right hand and exited the taxi, a gun fell out of his jacket. At that point, the officers arrested him. Bulman and Meade filled out a TIPS form and took the appellant to

the station house for booking. A search performed at that time turned up crack cocaine, a pipe, a pager, and some cash.

In due course, federal authorities charged the appellant with being a felon in possession of a firearm and ammunition, and with possessing cocaine base with intent to distribute. See 18 U.S.C. §922(g)(1); 21 U.S.C. §841(a)(1). The appellant moved to suppress the physical evidence gleaned as a result of the stop, as well as evidence of incriminating statements made during his detention. Following an evidentiary hearing, the district court upheld the stop on dual grounds: first, that the circumstances gave rise to reasonable suspicion of criminal activity, warranting the stop; and second, that TIPS legitimated it. See United States v. Woodrum, No. 98-10183-RGS, 1998 WL 849373, at *3 (D. Mass. Dec. 1, 1998). The appellant then entered a conditional guilty plea to reduced charges, reserving the right to appeal the denial of his suppression motion. See Fed. R. Crim. P. 11(a)(2). The district court imposed sentence and this appeal followed.

II. ANALYSIS

We begin our substantive discussion with a synopsis of certain Fourth Amendment principles and then proceed to discuss this case.

A. The Legal Landscape.

It is doctrinal bedrock that a police stop of a moving vehicle constitutes a seizure of the vehicle's occupants and therefore comes within the purview of the Fourth Amendment. See Whren v. United States, 517 U.S. 806, 809-10 (1996); United States v. Hensley, 469 U.S. 221, 226

(1985). This principle applies equally to drivers and passengers. See United States v. Sowers, 136 F.3d 24, 27 (1st Cir. 1998); see also Whren, 517 U.S. at 819 (evaluating a passenger's challenge to a traffic stop along with the driver's). Hence, each occupant of a car has a right to challenge the propriety of a traffic stop under the Fourth Amendment. Although courts occasionally use the term "standing" as a shorthand for this status, the real implication is that the individual's Fourth Amendment interests were affected by official actions. See Rakas v. Illinois, 439 U.S. 128, 138-39 (1978); United States v. Sanchez, 943 F.2d 110, 113 n.1 (1st Cir. 1991).

The primary interests that the Fourth Amendment protects in this type of situation include the interest in freedom of movement and a concomitant interest in being insulated from the fear and anxiety that frequently accompany a sudden, unexplained stop. These interests "are personal to all occupants of the vehicle." United States v. Kimball, 25 F.3d 1, 5 (1st Cir. 1994). Although Kimball dealt with a private automobile, its logic applies equally to taxicabs. A taxi fare - who by definition has contracted to pay for both the right to exclude others from the cab and the right to control its destination in certain respects - has a reasonable expectation that he will not gratuitously be seized while en route. See Rios v. United States, 364 U.S. 253, 261 (1960); see also Townes v. City of New York, 176 F.3d 138, 144 (2d Cir. 1999)(describing as "clearly established" a taxicab passenger's right to be free from unreasonable seizure).

Absent a warrant, the police can intrude on such an expectation only in a few carefully circumscribed kinds of situations. See Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). One such situation arises "where a police officer

observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30 (1968). In such circumstances, the officer may stop a taxicab briefly and make reasonable inquiries of the suspect designed to confirm or dispel his suspicions. See, e.g., Guam v. Ichiyasu, 838 F.2d 353, 355-56 (9th Cir. 1988); see generally Dickerson, 508 U.S. at 373; Terry, 392 U.S. at 30. A second exception to the warrant requirement comes into play where an individual voluntarily consents to an intrusion. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Warrantless searches and/or seizures also have been upheld if the public interest in safety overbalances the intrusion on the individual so that the intrusion is reasonable. See, e.g., Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990)(involving a highway checkpoint stop); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976)(same). Additional exceptions to the warrant requirement include administrative inspections and inventory searches. See, e.g., New York v. Burger, 482 U.S. 691, 702-03 (1987); Colorado v. Bertine, 479 U.S. 367, 371 (1987).

B. The Merits.

In this instance, the government argues that the officers' warrantless stop of the cab was justifiable under two of these exceptions - as a "Terry stop" based on reasonable suspicion or, alternatively, as a stop premised upon the taxi owner's consent. The district court found both arguments persuasive.

1. Reasonable Suspicion. To justify a stop under the reasonable-suspicion standard, the government much show "specific and articulable facts which, taken together

with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. The officer making the stop "must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch'" linking an individual to criminal activity. United States v. Sokolow, 490 U.S. 1, 7 (1989)(citation and some internal quotation marks omitted). This means that some of the facts on which the officer relies must be particular, that is, specific to the individual. See United States v. Cortez, 449 U.S. 411, 418 (1981); Terry, 392 U.S. at 21 n.18; United States v. Proctor, 148 F.3d 39, 42 (1st Cir. 1998). Consequently, the proper focus for evaluating the sufficiency of evidence of reasonable suspicion centers upon the objective significance of the particular facts under all the circumstances. See, e.g., Reid v. Georgia, 448 U.S. 438, 441 (1980)(per curiam).

It is important to recognize that the Terry standard has a practical, commonsense bent. Thus, a combination of independently innocent behaviors and circumstances, both general and specific, can create reasonable suspicion in certain cases. See Sokolow, 490 U.S. at 9; see also Terry, 392 U.S. at 30 (explaining that reasonable suspicion may exist when the totality of the discerned circumstances signals "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot"). Deference is due to the experienced perceptions of the officers, see Ornelas v. United States, 517 U.S. 690, 699-700 (1996), but not blind deference; these perceptions must be reasonable under an objective standard, see Terry, 392 U.S. at 21.

In this case, most of the facts underpinning the officers' stated suspicion were not particular to the appellant. These included the recent report of a shooting, the crime-

ridden neighborhood, and the hour. While such facts may put officers on their guard, they cannot alone justify a stop. See Kimball, 25 F.3d at 7. Were the law otherwise, any person who happened to wander into a high-crime area, late at night, in the immediate aftermath of a serious crime, could be detained.

The only suspect-particular observation on which the district court relied was that Woodrum tried to hide from the officers (or so they thought). The Supreme Court has held that, in some contexts, an obvious attempt to hide or to evade the authorities can be a factor in the calculus of reasonable suspicion. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975). Thus, slouching, crouching, or any other arguably evasive movement, when combined with other factors particular to the defendant or his vehicle, can add up to reasonable suspicion. See, e.g., United States v. Sharpe, 470 U.S. 675, 682 n.3 (1985); United States v. Aldaco, 168 F.3d 148, 152 (5th Cir. 1999). But not every slouch, crouch, or other supposedly furtive movement justifies a stop. See, e.g., Reid, 448 U.S. at 441; United States v. Guillen-Cazares, 989 F.2d 380, 384 (10th Cir. 1993). The proper inquiry is case-specific and context-contingent, and the surrounding circumstances ordinarily will tell the tale.

Here, reasonable suspicion presents a question that can be argued persuasively either way. On the one hand, a slouching movement is inherently ambiguous and, for the reasons that follow, it is especially difficult to draw an inference of criminal activity from the appellant's recession into the far corner of the back seat. Meade and Bulman were in plainclothes and standing near an unmarked vehicle. Their testimony is unilluminating as to whether any police cruisers or other identifiable police vehicles were parked at the scene

or whether any uniformed police officers were in sight. The significance of the fact that an ordinary observer might not have known that the people clustered on the street corner were police may well be magnified, rather than lessened, by the totality of the circumstances: the early hour, the dangerous neighborhood, and the prevalence of crime likely would make an innocent person fearful for his safety and, accordingly, desirous of anonymity.

Despite the seeming persuasiveness of this argument, there is another side to the story. The street-wise judgments of experienced police officers are entitled to weight, and it is at least arguable that, given the peculiar concatenation of circumstances, the appellant's act of slouching down in the back seat, after seeing the officers, set him apart as someone who reasonably might be suspected of criminal activity.

To complicate matters further, this area of the law is in some flux. A divided Supreme Court (5-to-4) recently held that an officer was justified in suspecting a man of criminal activity when the man was in a high-crime district and fled upon seeing the officer. See Illinois v. Wardlow, ___ S. Ct. ___, ___ (2000). The majority emphasized that evasive behavior - even evasive behavior that at some level is ambiguous - is a "pertinent factor in determining reasonable suspicion." Id. at __. Wardlow requires courts to reevaluate the calculus of reasonable suspicion. Under the circumstances, we think that the district court's alternative holding - that the taxi driver had authority to consent to a TIPS stop, and that the consent legitimized this particular stop, see Woodrum, 1998 WL 849373, at *3 - is less problematic. Accordingly, we elect to forgo resolution of the reasonable-suspicion inquiry.

2. **The TIPS Consent.** Of course, the district court's alternative holding is also controversial. The appellant attacks it on several fronts. He maintains, inter alia, that there was insufficient evidence to establish either the taxi owner's or the taxi driver's consent and that, in all events, the consent of another could not legitimate stopping him absent his consent. He also postulates that the TIPS compact impliedly conditions the driver's employment on the sacrifice of Fourth Amendment rights and does not sufficiently limit the discretion of the officers executing it (and is, for these reasons, unconstitutional). Finally, he charges that, even if a TIPS consent legitimizes some stops, its scope does not extend to this stop because it was motivated by reasons apart from driver safety. These arguments warrant close perscrutation. In the end, however, we find them unpersuasive.

This case involves an unusual situation. Most of the decided cases dealing with the consent exception to the warrant requirement analyze that exception in the context of a search as opposed to a seizure. See, e.g., Illinois v. Rodriguez, 497 U.S. 177, 181-82 (1990); United States v. Matlock, 415 U.S. 164, 169-72 (1974); Schneckloth, 412 U.S. at 219. One reason, of course, is that in cases in which a person merely pauses voluntarily to answer a gendarme's questions, the detention customarily is not viewed as a seizure at all. See Florida v. Royer, 460 U.S. 491, 497 (1983)(plurality opinion); United States v. Mendenhall, 446 U.S. 544, 555 (1980)(opinion of Steward, J.); cf. INS v. Delgado, 466 U.S. 210, 218 (1984)(holding that factory workers were not seized when INS agents questioned them with their employer's consent).

However, when an encounter takes some appreciable time or moves to a private space (say, an interrogation room or a dwelling), the justification for the detention becomes an issue because the individual may no longer understand his participation to be voluntary. See, e.g., Mendenhall, 446 U.S. at 557-58; Kimball, 25 F.2d at 8; United States v. Berry, 670 F.2d 583, 598, 604 (5th Cir. 1982)(en banc). This furnishes an apt analogy for our case. At least for the interval immediately after an officer bent on making a TIPS stop flashes his lights in a show of authority, neither the driver nor the passenger knows why their journey is being interrupted or has much reason to think that stopping is optional. The suspense of those early moments necessarily impinges on Fourth Amendment interests. See Sitz, 496 U.S. at 452-53; Martinez-Fuerte, 428 U.S. at 558. Put another way, because the officer's initiative "communicate[s] to a reasonable person that he [is] not at liberty to ignore the police presence and go about his business," a seizure occurs. Michigan v. Chesternut, 486 U.S. 567, 569 (1988); accord Florida v. Bostick, 501 U.S. 429, 437 (1991). Therefore, Woodrum was seized in the course of the TIPS stop.

The government concedes the fact of the seizure, but responds that the taxi owner's consent to TIPS authorized it. The government, of course, has the burden of proving the voluntariness of the consent on which it relies. See Mendenhall, 446 U.S. at 557. But, as far as the evidence shows, the owner freely chose to register for the program of taxi safety stops, and the TIPS decals furnish tangible proof of this consent. Although the consent was anticipatory and

unparticularized, it was direct.[1/] No more is exigible to sustain the devoir of persuasion.

We turn, then, to the significance of this consent vis-a`-vis the driver. It is at least arguable that the owner of a vehicle may authorize the kind of "safety stop" envisioned by the TIPS program over the driver's objection. Cf. United States v. Carter, 569 F.2d 801, 803-04 (4th Cir. 1977)(per curiam)(holding that an employer had power to consent to a search of a company-owned vehicle even if the vehicle was used almost exclusively by one employee); New Hampshire v. Collins, 581 A.2d 69, 72-73 (N.H. 1990)(similar). The rationale of these cases, and others like them, flows smoothly from the Court's admonition that "when the prosecution seeks to justify a warrantless search by proof of a voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Matlock, 415 U.S. at 171. The Matlock rationale might well be transferable to, and ultimately justify, reliance on an employer's consent to a stop, without more.

Here, however, we do not need to go so far as to hold that the owner's property rights in the vehicle and his entitlement to supervise its use legitimize all incidental intrusions occasioned by his consent to the seizure of his

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[1/] This directness distinguishes this case from cases in which courts are asked to imply the owner's consent indirectly from his voluntary undertaking to do something that he has been warned might lead to a search or seizure. See, e.g., McGann v. Northeast Ill. Reg'l Commuter R.R. Corp., 8 F.3d 1174, 1179-83 (7th Cir. 1993).

property. The purpose of the owner's consent here was not to implicate the driver in wrongdoing, but, rather, to secure the driver's safety (and, concomitantly, to preserve the value of his investment). In other words, in consenting to TIPS, the owner acted on the employee's behalf as well as his own.[2/] This identity of interests permits us to conclude that the brief and incidental detention of the driver brought about by the consensual seizure of the owner's property was reasonable under the Fourth Amendment, cf. Marshall v. Barlow's Inc., 436 U.S. 307, 316-17 (1978)(confirming that an employer may consent to OSHA inspections of workplace premises), and our holding need not sweep more broadly.

If more were needed - and we doubt that it is - the driver of the cab that the appellant hailed should not merely have expected and appreciated the consent but should have known of it. Thus, we think it fair under the circumstances to regard the driver himself as having consented to the stop. The detention involved no search and, as we have said, driver safety was implicated. Moreover, decals festooned the vehicle, and the conspicuousness of the display put the driver squarely on notice that the owner had enrolled the cab in the TIPS program. In our view, these decals symbolized both the owner's and the driver's consent to future stops.

[2/] Indeed, the taxi owner's consent reasonably can be viewed as a fulfillment of his employment-related duty to provide a safe workplace for his drivers. After all, the drivers' safety is a work-related interest of the employer, unlike an abstract interest in cooperating with police to abate crime in general, and employees can expect an employer to seek police assistance in protecting the former interest even if consent to a criminal investigation of their outside activities would be suspect. See Collins, 581 A.2d at 73.

The appellant attempts to parry these thrusts by insisting that, regardless of notice, the owner's initiative effectively abrogated the driver's Fourth Amendment right to resist searches and seizures, and that this abrogation imposed an unconstitutional condition on the employment relationship. This contention cannot withstand scrutiny. In the first place, the record contains no evidence that consent was a condition of employment. Thus, we do not know whether a nonconsenting driver would have been discharged or, in the alternative, permitted to remove the TIPS decals. In the second place, the appellant's position rests on an unstable legal foundation. Although public employers ordinarily cannot condition employment on an employee's consent to search, see Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), the taxi involved in this incident was privately owned and the driver privately employed. There is no sign that the government directed or required the owner to make TIPS participation a condition of employment. Where, as here, the government gives the private sector a free choice, the Pickering doctrine is inapposite. See Koveleskie v. SBC Capital Mkts., 167 F.3d 361, 368 (7th Cir. 1999). In the absence of any showing that state action prompted the imposition of the alleged term of employment, the appellant's "unconstitutional condition" argument founders.

We next inquire whether the owner's and driver's consent may justify a TIPS stop even though no positive consent has been obtained from the passenger. The district court answered this query affirmatively on the ground that "[t]he operator of a taxi . . . has the authority to consent to its search over the objection of his passenger." Woodrum, 1998 WL 849373, at *3. This reasoning overlooks that a mere passenger has a right to protest a traffic stop, see Whren, 517 U.S. at 809-10; Sowers, 136 F.3d at 27, but no corresponding

right to protest the search of someone else's vehicle, see Rakas, 439 U.S. at 148. Accordingly, we take a different ratiocinative route - but in the end, hold that the passenger may be briefly detained even in the absence of his consent.

At times, an individual can consent to an intrusion that affects another's constitutionally protected interests without overstepping the bounds of the Fourth Amendment. Thus, for example, when two persons share common authority over premises or effects, one party's consent legitimates a warrantless search even if the search is aimed at ferreting out evidence of the other party's malefactions. See Matlock, 415 U.S. at 171. The Court's elaboration of this "third-party consent" principle has particular pertinence for present purposes:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7.

Up to now, this principle has found expression only in the context of consents to the search of property - but there is no sound reason to restrict the principle rigidly to that milieu.

As this case illustrates, the logic of third-party consent can be adapted to seizures in some circumstances.

Freedom of movement is one of the foremost interests impugned by a traffic stop, see Kimball, 25 F.3d at 5, and the occupants of a cab - driver and passenger alike - plainly allocate shared control over their intertwined freedom of movement. The passenger's implied contract qua fare gives him a degree of authority over the direction and destination of the vehicle. By like token, the driver's command of the taxi allows him to maintain control over the vehicle's speed and route of travel. Bearing this shared authority in mind, it does not seem like a stretch to say that the driver has the authority to consent to a stop in his own right, and that the passenger, by entering the cab, assumes the risk that the driver may exercise his right to sop briefly along the way (say, to converse with a police officer).[3/]

To be sure, this does not mean that a taxicab passenger assumes the risk of every type of seizure. The actions taken pursuant to the consent must be reasonable - and the Supreme Court has made it clear that "[t]he reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public

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[3/] This mutuality of control of the vehicle's movement distinguishes this situation from cases such as Stoner v. California, 376 U.S. 483, 489 (1964), and Chapman v. United States, 365 U.S. 610, 612-13 (1961). In those cases, owners of real estate retained access to rented premises for particular purposes, but the lessees had ultimate control over the use to which the rented space was put (and presumably the power to exclude the owner, at least for most purposes). See Matlock, 415 U.S. at 171 n.7 (distinguishing these two cases). In contract, Woodrum had no right to divest the driver of control over the cab, and the stop intruded on both parties' rights in the same way and to the same degree.

interest and the individual's right to personal security free from arbitrary interference by law officers." Brown v. Texas, 443 U.S. 47, 50 (1979)(citations and internal quotation marks omitted). Viewed in this light, determining the constitutionality of any given seizure requires a court to weigh factors such as "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Id. at 51; accord Sitz, 496 U.S. at 450-54; Lopez Lopez v. Aran, 844 F.2d 898, 905 (1st Cir. 1988). All seizures must be reasonable. See U.S. Const. amend. IV. Seizures by consent generally are considered reasonable, see Florida v. Jimeno, 500 U.S. 248, 250-51 (1991), because the consent acknowledges the individual's right to be free from interference and vitiates the intrusiveness of the action. Withal, the reasonableness of a seizure by third-party consent is less direct and must be analyzed by balancing the public interest against the individual's rights, as affected by another's consent to an intrusion.

In this instance, we conclude that the nature of TIPS makes the operator's consent a reasonable justification for stopping a taxicab (even though the stop involves, as we have said, a seizure of both the driver and the passenger). After all, TIPS came into being as a considered response to grave safety concerns; many taxi drivers had been robbed and two had been murdered. Given the obvious public interest in preventing such incidents, this history weighs heavily in constructing the requisite balance.

Moreover, the consent does not leave stops to the officers' unfettered discretion. The order issued to police personnel specifies that TIPS stops are to be conducted only

"when . . . necessary" to check on the taxi operator's safety. The record contains unrebutted testimony that this language accurately characterizes the actual implementation of the program.[4/] Since police officers are constrained by that directive, we must regard a taxi owner's consent to TIPS stops as narrow in scope and purpose. See id. at 251 ("The scope of a search is generally defined by its expressed object."); Walter v. United States, 447 U.S. 649, 656 (1980)(plurality opinion)(similar); see also United States v. Turner, 169 F.3d 84, 87 (1st Cir. 1999)(explaining that a consensual search may not exceed the scope of the consent).

On the other pan of the scale, we weigh the rather modest intrusion on passengers' liberty that TIPS entails. According to the officers' uncontradicted testimony, TIPS stops are usually brief and involve only limited inquiries to the driver and a quick visual inspection of the cab's interior. Objectively viewed, the intrusion is slight. See Martinez-Fuerte, 428 U.S. at 558; cf. Rios, 364 U.S. at 262 (suggesting in dictum that a monetary routine interrogation of the occupants of a standing taxi would not offend the Fourth Amendment).

We find more nettlesome the subjective aspects of the intrusion, as a reasonable passenger might well experience fear or anxiety in the interval between a stop and an officer's explanation. See Delaware v. Prouse, 440 U.S. 648, 657 (1979). Even so, under the TIPS regime this interval is usually quite brief, and the possibility of emotional distress is

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[4/] Because we construe the program in the light most favorable to constitutionality, see Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), we presume that the order did not allow completely random stops.

lessened somewhat by the existence of the decals and publicity about the program - avenues through which a reasonable passenger might be aware that the police were stopping taxis to check the drivers' well-being. Cf. Martinez-Fuerte, 428 U.S. at 558 (suggesting that subjective intrusions are of less concern when passengers know that a stop is a matter of routine). Furthermore, to the extent that a passenger assumed the risk that the driver would consent to the intrusion, see supra at 19-20, the intrusion is not an impediment to reasonableness. See Matlock, 415 U.S. at 171 & n.7.

Assaying all of these competing considerations, we conclude that a seizure which occurs in the form of a voluntary, properly conducted TIPS stop passes the Supreme Court's balancing test. Consequently, we find the application of the third-party consent principle compelling and we hold that a police officer's stop of a taxicab displaying TIPS decals for purposes of checking on the driver's safety is reasonably justified by the owner's consent, notwithstanding the presence of a passenger in the cab who has not given any express consent.

The question remains whether this particular stop was justified by the taxi owner's consent. In this connection, the appellant's major premise is that the stop was not within the ambit of the consent because its impetus lay in the officers' desire to investigate a recent shooting rather than their desire to assure the driver's safety. The appellant's minor premise is that the officers effectively vitiated the consent by their failure after the initial stop to follow TIPS protocol.

We begin our analysis of these matters by reviewing what transpired below. The district court ruled that the

officers' subjective motivations did not matter; the stop was constitutional, the court reasoned, as long as the officers could have stopped the taxi constitutionally. See Woodrum, 1998 WL 849373, at *3. For this proposition, the court cited Whren, 517 U.S. at 814-15, in which the Supreme Court held that officers who had probable cause to believe that a driver had committed a minor traffic violation could constitutionally stop the vehicle even though their actual motivation to do so grew out of a suspicion that the occupants possessed drugs.

We cannot accept the district court's approach. Unlike in Whren, the purpose of the stop matters here. Because the authority provided by the consent was limited, the officers' reasons for effecting the stop are relevant to whether the consent legitimated it. A consent to TIPS probably would not justify, for example, a stop aimed at questioning a docile eyewitness to a recent crime of one aimed at collaring an illegal alien not thought to be dangerous.

Despite our disagreement with the lower court, we hold that the stop was within the purview of the consent. The scope of a consent is determined by what a reasonable person would think it to be. See Jimeno, 500 U.S. at 251. On that basis, the cab owner's consent to stops that are necessary to ensure the drivers' safety plainly would include stopping a taxi when a violent crime has occurred close by and the police have concluded (rightly or wrongly) that the passenger might be the culprit - a circumstance which most assuredly would place the driver in potential peril. To require a full-fledged, objectively reasonable suspicion would effectively nullify the TIPS program, a result that a reasonable person evaluating the scope of consent to the program surely would resist. Because a TIPS consent authorizes stops when police

officers suspect that a cab driver is in harm's way, Meade's and Bulman's bare suspicion that a violent criminal was in the taxi justified this stop.[5/] Cf. United States v. Lopez-Pages, 767 F.2d 776, 778 (11th Cir. 1985) (stating that mere suspicion is enough to support a search once a passenger voluntarily has presented himself at an airport security area, and that reasonable suspicion is not necessary).

We need not linger over the appellant's minor premise. We already have determined that the initial stop did not in any way offend the Fourth Amendment. From that point forward, the officers' actions were fully justified by reasonable suspicion. Thus, any deviations from the TIPS protocol that may have transpired after the initial stop were of no moment. We explain briefly.

As the officers approached the taxi, they saw the appellant lean down toward his left side and they reasonably suspected that he was concealing a weapon inside his jacket. Then, when they peered into the back seat, they saw the appellant's right hand moving around underneath his jacket. This is exactly the kind of situation in which an officer's experience deserves deference. See, e.g., United States v. Mitchell, 951 F.2d 1291, 1296 (D.C. Cir. 1991); see also United States v. Beatty, 170 F.3d 811, 814 (8th Cir. 1999); United States v. Young, 105 F.3d 1, 7 (1st Cir. 1997). This reasonable suspicion that the appellant was concealing a weapon justified the officers in blocking his exit, asking him

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[5/] To be sure, one officer testified that he would have made the stop even if the taxi did not have TIPS emblemata - a course of action that would have no discernible legal justification. But that testimony does not affect the outcome of this appeal. We concern ourselves with what was, not with what might have been. See Proctor, 148 F.3d at 42.

to show his hands, and ordering him to step out of the taxi. See Terry, 392 U.S. at 24 ("When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."); cf. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)(holding that officers may ask the occupant of a vehicle to step outside during a traffic stop even when no reasonable suspicion of criminal activity exists).

That ends the matter. Once the appellant exited the vehicle, the weapon tumbled into plain view, and the officers had every right to act on what they saw.

III. CONCLUSION

We need go no further. The taxi owner's consent to TIPS authorized the police to stop the taxi in which the appellant was riding on the mere suspicion that a dangerous felon might be inside. The officers' actions after the stop were legitimated by reasonable suspicion that the appellant was carrying a weapon and by caution for their own safety. Neither the stop nor the officers' subsequent actions offended the Constitution. Hence, we uphold the district court's denial of the motion to suppress evidence gleaned therefrom.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 99-1697

UNITED STATES,
Appellee,

v.

RONALD WOODRUM,
Defendant, Appellant.

JUDGMENT

Entered: January 20, 2000

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Phoebe Morse, Clerk

By Janice M. O'Neil
Chief Deputy Clerk.

United States Court of Appeals
For the First Circuit

No. 99-1697

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD WOODRUM,
Defendant, Appellant.

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
Boudin, Circuit Judge.

ORDER OF COURT
Entered: April 6, 2000

Upon consideration of appellant's petition for rehearing, It is ordered that the petition for rehearing be denied.

By the Court:

Phoebe Morse, Clerk.

By Janice M. O'Neil
Chief Deputy Clerk.

[cc: Messrs: Shapiro, Richardson, Hamilton, Wortmann and Ms. Chaitowitz]

United States Court of Appeals
For the First Circuit

No. 99-1697

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD WOODRUM,
Defendant, Appellant.

Before

Torruella, Chief Judge

Selya, Boudin, Stahl, Lynch and Lipez,
Circuit Judges.

ORDER OF THE COURT

Entered: April 6, 2000

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted

to order that the appeal be heard or reheard by the Court en banc, the Court being equally divided,

It is ordered that the petition for rehearing en banc be denied.

Dissent attached. (Lynch, Circuit Judge, joined by Torruella, Chief Judge and by Lipez, Circuit Judge as to Parts II and III).

By the Court:

/S/

Phoebe Morse, Clerk.

LYNCH, Circuit Judge, with whom TORRUELLA, Chief Judge, joins, and with whom LIPEZ, Circuit Judge, joins as to Parts II and III, dissenting. I respectfully dissent from the denial of defendant Woodrum's petition for rehearing en banc for two reasons: the case has great constitutional and societal significance, and so meets the requirements of Rule 35(a), Fed. R. App. P., and there is reason to doubt that the opinion is correctly decided.

I.

This case is an important one, not just for the development of Fourth Amendment law, but also for the quality of life in urban areas and the protection of individual rights. These factors alone argue for rehearing en banc. The panel decision permits police, without any particular

justification, to stop and look over taxicabs occupied with passengers. This is a seizure under the Constitution, as the government concedes. See Townes v. City of New York, 176 F.3d 138, 144 (2d Cir. 1999). Normally, the government would need probable cause, or at least reasonable suspicion, of a crime to make such a stop. If, after the stop, the police see anything that looks suspicious, they may then get the passenger out of the cab. If the police see that the passenger has something illicit (here a gun), the passenger may be arrested and the evidence seized. The latter two "if" propositions are well established under Fourth Amendment law. But the opening premise -- that the police may randomly stop a cab with a passenger -- is a new rule and is the crux of the matter here.

According to the panel, a voluntary, police-sponsored program (called the Taxi Inspection Program for Safety or TIPS) justifies this new rule. By its participation in TIPS, the cab company consents to the police stopping the cab, the company's consent can be attributed to the cab driver, and from there, consent can be imputed to the passenger because of his decision to enter the cab. See United States v. Woodrum, 202 F.3d 1, 9-11 (1st Cir. 2000). Thus, effectively, the cab company is permitted to be free from seizure.

There are important interests on both sides of this case. Begun in 1991 as "Operation Taxi," and modified in 1996 to become TIPS,[1/] the program is a well-

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[1/] The program was revised after a number of Massachusetts trial courts granted motions to suppress items seized in searches that resulted from "Operation Taxi" stops. See Commonwealth v. Carle, Nos. 94-11050, 94-11049, 1995 WL 737537, at *3 (Mass. Super. Ct. Oct. 31,

intentioned response to a rash of attacks and shootings, some fatal, of cab drivers by passengers, particularly in minority urban areas. Cab driving -- in Boston, as elsewhere -- is a notoriously dangerous occupation and the safety of drivers has been, and continues to be, at risk. Efforts to protect the safety of cab drivers are certainly warranted. And one of the collateral benefits of the TIPS program may be to encourage cab drivers to provide service to certain neighborhoods, neighborhoods they would otherwise shy away from. Given the realities of urban life, the panel's decision affirming the validity of consent to seizure through the TIPS program may mean that the TIPS program will be emulated in other cities and in other sectors of the economy.[2/]

But there are also interests on the other side, particularly Fourth Amendment interests. The very purpose of many constitutional guarantees, particularly those contained in the Fourth Amendment, is to fetter the exercise of discretion by the police. Indeed, it may be unhealthy for the police themselves to have such unfettered discretion, as such discretion could easily lead to dishonest and sloppy police work. Further, unfettered police discretion has at

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1995); Commonwealth v. Bland, No. 94-10127, 1994 WL 879833, at *3-*4 (Mass. Super. Ct. Aug. 23, 1994); Commonwealth v. Cosme, No. 94-10014, 1994 WL 879664, at *4 (Mass. Super. Ct. May 9, 1994).

[2/] New York City implemented a similar program, now called TRIP (Taxi and Livery Robbery Inspection Program), in 1993. Recently, the New York Court of Appeals found seizures conducted under the program constitutionally invalid, thereby tainting evidence acquired as a result. See In re Muhammad F., 722 N.E.2d 45, 51-52 (N.Y. 1999), petition for cert. filed sub nom. New York v. Muhammad F., 68 U.S.L.W. 3577 (U.S. Mar. 14, 2000)(No. 99-1443); see also United States v. Santiago, 950 F. Supp. 590, 596-98 (S.D.N.Y. 1996).

times led to racial bias in law enforcement, whether intended or not. Commentators and cases have noted that being "stopped for being black" is a frequent occurrence. See, e.g., Randall Kennedy, Race, Crime, and the Law 138-63 (1997). A decade ago, the Massachusetts Attorney General issued a report assailing the Boston Police Department for the practice of subjecting black citizens to unconstitutional searches and seizures. See Report of the Attorney General's Civil Rights Division on Boston Police Department Practices (Dec. 18, 1990), cited in David Cole, No Equal Justice 25-26 & 57 n.30 (1999). And in 1992, the Supreme Judicial Court of Massachusetts held unconstitutional, under the Fourth Amendment, another policy of the Boston Police, under which the police stopped and searched known or suspected gang members and their associates on sight.[3/] See Commonwealth v. Phillips, 595 N.E.2d 310, 314-16 (Mass. 1992).

The police already have considerable discretion to stop persons. A police officer can stop a person based simply on reasonable suspicion, see Terry v. Ohio, 392 U.S. 1, 30

[3/] As Judge Newman has said,

> [t]he risk inherent in such a practice is that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity -- factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hari, heavy jewelry, and flashy clothing.

United States v. Scopo, 19 F.3d 777, 785 (2d Cir. 1994)(Newman, C.J., concurring).

(1968), and in determining whether they have reasonable suspicion, the police may consider the fact that a person turns and runs, see Illinois v. Wardlow, 120 S. Ct. 673, 676 (2000). In addition, traffic stops, in practice, may be used as a pretext to investigate other crimes because courts will not usually inquire into the actual motives of the police. See Whren v. United States, 517 U.S. 806, 813 (1996). Although police may not make stops based on race, it is difficult to show such motivation, and even obtaining discovery about racial practices is difficult. See United States v. Armstrong, 517 U.S. 456, 468-70 (1996). When one sector of the community feels the brunt of discretionary police action more than others, that sector may be less likely to accept that the purpose of the law is to protect them. The extension of police discretion that results from the panel decision and its societal consequences make this case worthy of a rehearing en banc.

II.

The case should be reheard by the en banc court because a novel constitutional issue is involved. It is far from clear that the panel's decision (even as amended) is correct. The case turns on the following question: Does the participation of the cab company in a voluntary program, which gives the company's consent to the police stopping a company's cab, amount to a consent by the passenger of the cab to being stopped, seized, and visually searched when there is neither reasonable suspicion nor probable cause to believe there is any criminal activity?

This question and the panel's answer raise a number of concerns. To begin with, the opinion applies third-party consent principles derived from the search context to the seizure context. This is novel. Woodrum made no individual

decision to submit to police authority. Rather, that decision was made for him by the taxicab owner, and imputedly, the driver.[4/]

The panel opinion correctly points out that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it . . . may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171 (1974). Common authority "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Id. at 171 n.7.

But there is no authority cited for the application of third-party consent rules to the seizure context. Indeed, the only authority cited by the panel for the proposition that "[s]eizures by consent generally are considered reasonable" is Florida v. Jimeno, 500 U.S. 248, 250-51 (1991). See Woodrum, 202 F.3d at 11. But that case is a search case, not a seizure case; it is a first-party consent case, not a third-party consent case; and it is a search of an automobile case, not a seizure of a person case. See Jimeno, 500 U.S. at 249. Indeed, the panel opinion acknowledges that third-party

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[4/] Even if the cab company could consent to stops and seizures of its cabs when the cab had only the driver in it, it does not follow that the driver has any authority to consent to the seizure of the passenger. It would be a fiction to characterize the consent given by the driver and the passenger as "direct."

consent has only been applied to searches, not seizures. See Woodrum, 202 F.3d at 10-11.

Critical to the panel's decision is the analogy it draws between the shared control over the taxicab and the shared control over a living space. The analogy is weak. In the latter instance, one co-habitant's consent is imputed to other co-habitants because persons living together reasonably understand that their housemates may invite outsiders (including the police) to enter the premises and look around "common areas."

Although the passenger, in entering a taxicab, certainly relinquishes some control over the technical driving decisions of the taxicab driver, the relationship is not like the sharing expected between housemates. When a passengers hires a taxicab, the expectation is that the passenger assumes control over all the important decisions, including the vehicle's travel route (should the passenger choose to specify) and its ultimate destiny. It is doubtful that a passenger, through nothing more than this relationship with the taxicab driver, consents to the unfettered discretion of the police to stop the taxicab in order to make sure that he himself is not a dangerous criminal.

Further, the relevant seizure, here, is not of the taxicab, and so the cab driver and passenger's overlapping authority over the vehicle is beside the point. For the purposes of third-party consent in this seizure, the relevant object over which the cab driver and passenger would need to have common authority is the taxicab passenger. But the cab driver does not, cannot, have common authority over the passenger's person; simply, and obviously, a person cannot

give third-party consent to the search or seizure of another person.

The opinion also discounts the privacy interests of someone who hails a cab. There is in fact a reasonable expectation of privacy by the passenger in a cab. Sometimes people take cabs precisely because cabs give a greater degree of privacy than public mass transit or even than walking along a sidewalk. If a cab driver were to stop the cab against the will of the passenger, the fare would normally end; the passenger's expectation is that the cab will not normally stop until it reaches the destination dictated by the passenger; and the passenger expects he will enjoy the privacy of the passenger compartment.

The cab passenger is not like someone who visits a prison and so "consents" to certain special prison procedures that are driven by security needs. Cf. United States v. Sihler, 562 F.2d 349, 350-51 (5th Cir. 1977). The better analogy may be to a hotel room, which, like a cab, is rented for sole occupancy for a period of time. We would not say that the owner of a hotel could consent to the search of hotel rooms occupied by guests through the owner's voluntary participation in a program that authorized police to enter the rooms at their discretion to protect the cleaning staff or to prevent theft of hotel property.[5/] In Stoner v. California, 376

[5/] It is a weak argument that a passenger who hails a cab, perhaps the only cab in sight and perhaps after dark, has voluntarily consented to being seized because there is a small decal on the cab indicating its participation in the TIPS program. In this case, Woodrum apparently hailed the cab in the dark between midnight and 1 a.m. on a January night in Boston. In Massachusetts, a cab is a public accommodation and a common carrier, and citizens have every reason to think that their constitutional rights will be protected, not waived, when they take a cab.

U.S. 483 (1964), the Supreme Court held that the Fourth Amendment protected a hotel guest from use of evidence seized under a "consent" to search his hotel room given by the desk clerk. See id. at 490.

Further, the purported "consent" here is of an odd sort -- it is not a consent to specific police action in a specific factual setting, as is usually the situation in consent to search cases. In those situations, the voluntariness of the consent is determined from the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). Here, by contrast, the anticipatory consent to seize given by the cab company is open-ended: the seizure may be at any time and under any circumstances. Cf. United States v. Patrick, 959 F.2d 991, 996 (D.C. Cir. 1992). Further, there is no mechanism for the cab company, the driver, or the passenger to revoke the anticipatorily given consent in a given situation. Indeed, the passenger here has no option to terminate the seizure and so this situation is unlike the search in Florida v. Bostick, 501 U.S. 429, 436-37 (1991). Thus, the panel approves a new and questionable Fourth Amendment doctrine of irrevocable anticipatory consent to seizure (and third-party consent at that).

See Mass. Gen. Laws. ch. 272, §92A (public accommodation); Hathaway v. Checker Taxi Co., 73 N.E.2d 603, 606-07 (Mass. 1947) (taxicab drivers, as common carriers for hire, owe their passengers the "highest degree of care"). As the Seventh Circuit has said, "Courts confronted with claims of implied consent have been reluctant to uphold a warrantless search based simply on actions taken in light of a posted notice." McGann v. Northeast Reg'l Commuter R.R. Corp., 8 F.3d 1174, 1180 (7th Cir. 1993). In any event, the standards for a voluntary waiver of a constitutional right are not met by hailing a cab and then getting in one that bears a TIPS decal.

In some respects, this case is more akin to random stops of motorists on public highways by the police that are not supported by probable cause or reasonable suspicion. In Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court held that such stops were unconstitutional. See id. at 663. In Prouse, the Court distinguished between impermissible "sporadic and random stops of individual vehicles making their way through city traffic" and permissible "roadblocks where all vehicles are brought to a halt or a near halt." Id. at 657. This case is unlike sobriety checkpoints where all cars and all drivers are stopped and inspected for signs of intoxication, a practice that was upheld in Michigan Department of State Police v. Sitz, 496 U.S. 444, 447 (1990). Indeed, the government has made no argument here that the stop can be justified under Sitz. The government's justification for the stop turns entirely on the issue of consent. As in Prouse, the police here had virtually unfettered discretion and the ability to engage in such selective enforcement.

"[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, 443 U.S. 47, 51 (1979). The TIPS program is not a plan "embodying explicit, neutral limitations on the conduct of individual officers." There is a purported limit in the police manual for the TIPS program that the "[s]tops should be conducted when and wherever necessary, particularly during the evening and early morning hours. Attention will be given to isolated and high crime areas." These instructions are so

broad that they most likely will not act as limits at all.[6/] In fact, the legend on the decal may be the most accurate description: "This vehicle may be stopped . . . at any time . . . ." If an open-minded anticipatory third-party consent to the seizure of a passenger in a cab is doubtful, and if the random stopping of cabs absent such consent is forbidden, then the result reached here is questionable.

III.

This is a difficult case and the panel opinion is a lucid articulation of an alternative analysis. But, for the reasons stated, I respectfully dissent from the denial of the petition of rehearing en banc.

[6/] A Massachusetts Superior Court judge held that almost identical instructions, in a predecessor program to TIPS, did not act to limit "the arbitrary and unbridled discretion of the police officer," Commonwealth v. Cosme, No. 9410014, 1994 WL 879664, at *4 (Mass. Super. Ct. May 9, 1994).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NUMBER 98-10183-RGS

UNITED STATES OF AMERICA

v.

RONALD WOODRUM

FINDINGS OF FACT, RULINGS OF LAW, AND
ORDER ON DEFENDANT'S MOTION TO SUPPRESS

December 1, 1998

STEARNS, D.J.

This case arises out of an early morning stop of a taxi cab by Boston police officers investigating a shooting incident. A loaded Smith & Wesson .38 caliber revolver was seized from the defendant, Ronald Woodrum, a passenger in the cab. Subsequently, during a booking search, a quantity of "crack" cocaine and drug paraphernalia were found on Woodrum's person. Woodrum was indicted by federal authorities for being a felon in possession of a firearm, 18 U.S.C. §922(g)(1), and for possession of cocaine base with intent to distribute, 21 U.S.C. §841(a)(1). Woodrum maintains that he was stopped without probable cause or reasonable suspicion in contravention of his rights under the Fourth Amendment. Hearings were held on Woodrum's motion on October 13 and 22, 1998. Testimony was taken from the arresting officers and various exhibits were offered in evidence.

FINDINGS OF FACT

Based on the credible evidence, I make factual findings as follows:

1. Sgt. Stephen Meade and Sgt. Eric Bulman were working as partners on the night of January 21-22, 1998, in the Grove Hall section of Roxbury in the City of Boston. Both officers were assigned to the Boston Police Youth Violence Strike Force. Sgt. Meade is a veteran officer with sixteens years of service. Sgt. Bulman has nine years of service on the force. The officers were in plain clothes and driving an unmarked police vehicle.

2. At approximately 12:10 a.m., while on Warren Street, near its intersection with Blue Hill Avenue, Meade and Bulman heard a radio report of a shooting in the area of Washington Street and Columbia Road. While responding, the officers were diverted by a report of an officer in foot pursuit of a suspect in the vicinity of Blue Hill Avenue and Castlegate Road. The officers parked in front of 496 Blue Hill Avenue, where inside, they assisted in making a drug arrest. The officers determined that the person arrested had no connection to the shooting.

3. Upon returning to their cruiser, Meade and Bulman observed an ITOA taxi emerge from Castlegate Road, a one-way, densely populated street. The taxi stopped before completing a turn onto Blue Hill Avenue in the direction of Geneva Street. Blue Hill Avenue is a major urban thoroughfare brightly lit by sodium vapor street lights. Woodrum was seated in the back seat of the cab. Woodrum made eye contact with the officers, and then crouched down out of view in the corner of the taxi. The area in and around

Castlegate Road was known to both officers as a high crime area plagued by gang activity.

4. In September of 1996, the Boston Police Commissioner, in response to a wave of robberies of taxi drivers, instituted the Taxi Inspection Program for Safety (TIPS). Special Order No. 96-41 encouraged uniformed and plain clothes officers to make frequent stops of participating cabs, particularly at night in high crime areas, to check on the drivers' safety. Taxi operators participating in the TIPS program are required to display decals on each rear side window of their cabs bearing the legend:

PUBLIC NOTICE

THIS VEHICLE MAY BE STOPPED AND VISUALLY INSPECTED BY THE BOSTON POLICE AT ANY TIME TO ENSURE DRIVER'S SAFETY

A third decal mus be conspicuously displayed in the passenger compartment. The parties stipulate that the IOTA cab in which Woodrum was riding bore the appropriate TIPS decals. Both Meade and Bulman were familiar with TIPS, and had previously stopped cabs under its auspices, but not on this night.

5. The officers activated the blue lights of their cruiser, causing the taxi driver to stop. As Meade and Bulman approached the cab, Woodrum, now sitting erect, was making agitated movements. Meade observed that Woodrum's right arm was concealed under a bulky ski jacket. When the officers simultaneously opened the doors of the taxi and identified themselves as police, Woodrum

exclaimed, "I'm not doing anything." With his left hand, he removed a bottle of beer from the outside pocket of his jacket. His right arm was still concealed beneath the jacket. Woodrum then said, "I don't have anything. All I have is a beer." After demanding that Woodrum show both of his hands, Meade ordered him out of the taxi. Woodrum protested that his leg was "stuck" (which did not appear to the officers to be true). When Woodrum finally got out of the taxi, a holstered revolver fell from his jacket to the ground. Meade yelled "gun," and Woodrum retorted, "It's not my gun, you're not going to put that on me." After a brief scuffle, Woodrum was arrested by Meade and Bulman, with the aid to two officers who had arrived on the scene. The defendant was handcuffed and advised by Sgt. Meade of his Miranda rights.

6. At the station, Woodrum was advised again of his Miranda rights. During a booking search, police seized a quantity of crack cocaine, a smoking pipe, and a pager. When Meade confronted Woodrum with the cocaine, he stated, "Damn, I wish I had never made that drop." When another officer asked Meade in Woodrum's presence about the type of firearm that had been recovered, Woodrum volunteered, "It's a revolver. I don't mess with automatics."[1/]

7. In addition to a standard police report, the officers submitted a contemporaneous TIPS form recording the stop of the taxi as required by the Commissioner's TIPS implementation order.

[1/] Woodrum does not challenge the search incident to booking. See Illinois v. Lafayette, 462 U.S. 640, 646 (1983). Rather he challenges the legality of the underlying detention. See Wong Sun v. United States, 371 U.S. 471, 488 (1963).

DISCUSSION AND RULINGS OF LAW

I will assume (contrary to the government's argument) that a taxi fare has a reasonable expectation of privacy in the passenger compartment of a cab. See Bates v. State, 494 A.2d 976, 980 (Md.Ct.Spec.App. 1985). See also United States v. Cooper, 133 F.3d 1394, 1401-1402 (11th Cir. 1998)(rental car, defendant retained a reasonable expectation of privacy despite an expired lease). I also recognize (as does the government) that the principles of Terry v. Ohio, 392 U.S. 1 (1968), apply with the same force to the stop of a moving vehicle as they do to the seizure of a pedestrian (despite the diminished expectation of privacy a person has while riding in a vehicle. See United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

Terry requires that "[b]ased upon [the] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981). The test is an objective one. Whren v. United States, 517 U.S. 806, 812-813 (1996). A combination of suggestive circumstances, largely innocent in and of themselves, when taken together, may amount to reasonable suspicion justifying a stop. United States v. Sokolow, 490 U.S. 1, 9 (1989). Of course, only those circumstances known to the officers prior to the stop may be considered. "[J]ustify[ing] the arrest by the search and at the same time ... the search by the arrest, 'just' will not do." Smith v. Ohio, 494 U.S. 541, 543 (1990)(per curium).

Within these strictures, what is the picture here? From the evidence adduced at the hearing, one can point to the following pertinent facts that courts have weighed in

assessing the existence of reasonable suspicion: (1) a report of a serious recent crime, United States v. Raino, 980 F.2d 1148, 1150 (8th Cir. 1992); and ambient high crime area, United States v. Trullo, 809 F.2d 108, 111-112 (1st Cir. 1987); and (3) a late hour, Commonwealth v. Silva, 366 Mass. 402, 407 (1974). None of these facts, taken alone or ensemble, would be legally sufficient to justify a stop because of their situational nature. If the law were otherwise, any citizen who by happenstance found himself at a late hour in the vicinity of Castlegate Road and Blue Hill Avenue in the aftermath of a crime would be fair game for investigation. What must be added to the mix is something that distinguishes a true suspect from a mere interloper. The one and only exceptional fact in this case is Woodrum's act of sliding out of view on making eye contact with the police. This is an obvious continuum between mere nervousness or an attempt to be inconspicuous in the presence of police, which falls short of reasonable suspicion, and conduct that is truly furtive and suggestive of possible danger. Compare United States v. White, 890 F.2d 1413, 1418 (8th Cir. 1989)("[B]ecoming nervous when one is confronted by officers of the law is not an uncommon reaction") with Commonwealth v. Moses, 408 Mass. 136, 140 & n.3 (1990) (suspect ducked below the dashboard of his car after making eye contact with officer). It is also true that behavior that might seem innocuous or ambiguous to a casual observer has more pregnant significance in the eyes of a police officer attuned to the rhythms of the street. United States v. Stanley, 915 F.2d 54, 56 (1st Cir. 1990). On balance, I am inclined to the view that Woodrum's act of ducking out of sight was in the circumstantial mix sufficient to justify a solid suspicion that some type of criminal activity was afoot.

There is, however, an independent basis for determining that the stop was lawful. That basis is the TIPS program, and the consent given by the taxi driver to the random stop of his cab by the Boston Police. The operator of a taxi certainly has the authority to consent to its search over the objection of his passenger.[2/] See United States v. Ruigomez, 702 F.2d 61, 64 (5th Cir. 1983); United States v. Dunkley, 911 F.2d 522, 526 (11th Cir. 1990); United States v. Eldridge, 984 F.2d 943, 948 (8th Cir. 1993).

But defendant argues, this is fictive. The officers stopped the cab because they suspected that Woodrum might have been involved in the earlier shooting, and not because of any actual concern for the safety of the taxi driver (who had manifested no signs of apprehension). Indeed, both officers testified that but for Woodrum's slouching movement, they would not have stopped the cab.[3/] This would seem conclusive, until one recalls that the test to be applied is a purely objective one. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990). See also Maryland v. Macon, 472 U.S. 463, 470-471 (1985). "[T]hese [prior] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Whren, 517 U.S. at 813. See also Ohio v. Robinette, 519

[2/] The reverse, of course, is not true. Given the passengers' fleeting association with the cab, he could not give effective consent to its search over the driver's objection.

[3/] Sgt. Meade testified candidly that while he was aware of TIPS, it was not a "leading" motivation in the decision to make the stop.

U.S. 33, 38-39 (1996) (an officer's subjective reasons for asking consent for a search are irrelevant to a Fourth Amendment analysis.[4/] The test, in other words, is not whether a reasonable officer would have made a stop. The question is whether the officer could have done so whatever his actual purpose. Whren, 517 U.S. at 814-815. See United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir. 1991); United States v. Cummins, 920 F.2d 498, 500-501 (8th Cir. 1990); United States v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995)(en banc). Because the officers could have lawfully stopped the cab for a TIPS inspection, the fact that TIPS played at best only a peripheral role in their decision is irrelevant.

Assuming arguendo that the officers did not have a reasonable suspicion that Woodrum was involved in criminal activity at the moment the cab was pulled over, they acquired such a suspicion when, on their approach to the cab, Woodrum made a dipping motion reasonably interpreted as an act of concealment, and was then observed with his right arm hidden under his jacket, giving rise to the reasonable

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[4/] It might be argued that Whren applies only when police have independent probable cause for an otherwise pretextual stop. "[A]ny disapproval [in our prior opinions] of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigative agendas" had arisen in the context of addressing "the validity of a search conducted in the *absence* of probable cause." 517 U.S. at 811. See United States v. Huguenin, 154 F.3d 547, 557 (6th Cir. 1998) (Whren inapplicable to a pretextual roadblock erected to deter drug trafficking). However, as Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) and Ohio v. Robinette, supra, make clear, a probable cause analysis is irrelevant to a stop or search based on consent. The issue is simply one of voluntariness.

inference that he was clutching a hidden object, quite possibly a weapon. See United States v. Stanley, 915 F.2d at 56. Woodrum's nervous exclamation that he "didn't have anything" was also reasonable support for an inference of consciousness of guilt. United States v. Atlas, 94 F.3d 447, 451 (8th Cir. 1996). Under the circumstances, it was proper for the officers to order Woodrum out of the taxi as precaution for their own and the driver's safety. Maryland v. Wilson, 519 U.S. 408, 414-415 (1997). It would also have been reasonable for the officers to undertake a protective frisk of Woodrum leading to the discovery of the gun and probable cause to arrest. Terry, 392 U.S. at 27.[5/] Because Woodrum's arrest was lawful, the subsequent booking search at the station leading to the seizure of the crack cocaine, smoking pipe, and pager was also lawful. United States v. Edwards, 415 U.S. 800, 802 (1974); Illinois v. Lafayette, 462 U.S. at 648. Woodrum's statements at the scene were not made in response to interrogation and are therefore admissible. Miranda v. Arizona, 384 U.S. 436, 478 (1966). Woodrum does not dispute that he was advised of his Miranda rights after being arrested and advised again prior to his booking. Thus, his subsequent statements at the station, whether made in response to interrogation or its functional equivalent, are also admissible.[6/]

[5/] In fact, the gun fell out of Woodrum's jacket in plain view of the officers.

[6/] Defendant does not argue that any of his statements were involuntary in the sense of not being the product of "a rational intellect and free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960).

ORDER

For the foregoing reasons, defendant's Motion to Suppress is DENIED in all respects.

SO ORDERED,

s/Richard G. Stearns
UNITED STATES DISTRICT JUDGE

BOSTON POLICE SPECIAL ORDER NUMBER 96-41

COPIES TO: ALL SUPERINTENDENTS AND DEPUTY SUPERINTENDENTS AND DIRECTORS

TO: ALL PERSONNEL

September 3, 1996

SUBJECT: TAXI INSPECTION PROGRAM FOR SAFETY (TIPS)

PURPOSE

To implement the Taxi Inspection Program for Safety (TIPS), a program created in partnership with members of the taxi industry, which is designed to promote the safety of taxi drivers throughout the City of Boston by encouraging frequent inspections of taxis (hackney carriages) to check on the safety of the operator. This Special Order is effective immediately and rescinds and replaces all previous orders, memos, rules or directives regarding safety inspections for the purpose of checking on the operator's safety.

GENERAL CONSIDERATIONS

Effective immediately, in an effort to promote the safety of taxi drivers throughout the City of Boston, the Taxi Inspection Program for Safety (TIPS) is hereby implemented. The TIPS program is a voluntary program which encompasses a preventive police response to crimes against taxi drivers by encouraging safety inspections of participating vehicles that display TIPS decals.

Hackney Carriage Unit Responsibilities:

The TIPS program will be administered by the Hackney Carriage Unit. The Hackney Carriage Unit is responsible for registering taxi owners in this voluntary program and for familiarizing members of the public with its goals and objectives. Program participants will be issued sequentially numbered decals by the Hackney Carriage Unit. Such decals will be affixed to the taxi in the following locations:

- affix decals to each of the rear side windows; and

- affix a third decal in a conspicuous location in the rear passenger compartment where passengers will be able to read it.

Patrol and Investigative Responsibilities:

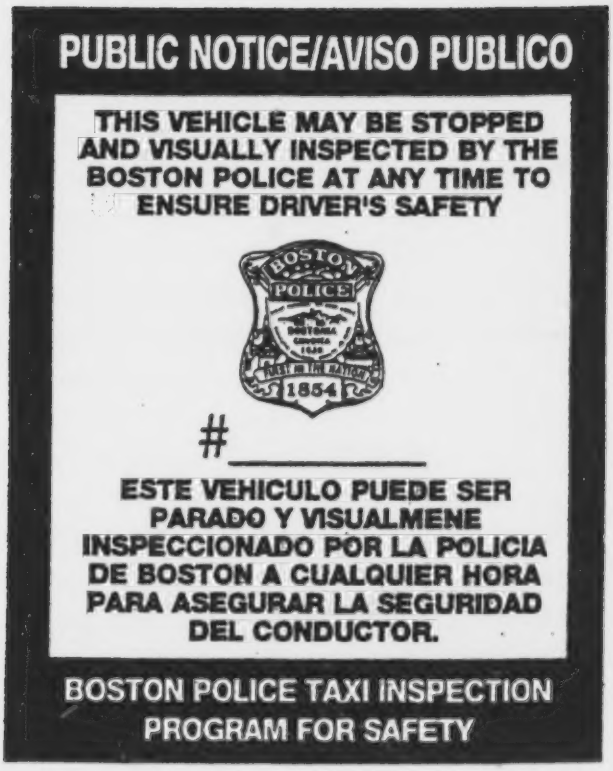
All Districts/Divisions will be issued Taxi Inspection Program for Safety forms (BPD form 1833, revised 8/96). Both uniform and plain clothes personnel are encouraged to make frequent stops of taxis which are displaying the above decals for the purpose of checking on the operator's safety.

Stops should be conducted when and wherever necessary, particularly during the evening and early morning hours. Attention will be given to isolated and high crime areas. Taxi drivers are not to be detained longer than is necessary to check on the welfare of the operator. Passengers in occupied taxis are to be given a brief explanation of the purpose of the stop: **Operator Safety**. A Taxi Inspection Program for Safety form (BPD form 1833, revised 8/96) shall be completed at the time of the stop. Such forms shall be

forwarded to the Hackney Carriage Unit by the District/Division Commander.

All sworn personnel are further reminded of the significance of the two amber emergency lights affixed to the roof of taxis. These lights are located directly above the center post between the front and rear doors and will flash continuously after being activated by the driver when assistance is needed. Whenever an officer observes these lights while they are flashing, the officer shall stop the taxi cab and determine if the driver is in danger or in need of assistance.

Paul F. Evans
Police Commissioner


PUBLIC NOTICE/AVISO PUBLICO
THIS VEHICLE MAY BE STOPPED AND VISUALLY INSPECTED BY THE BOSTON POLICE AT ANY TIME TO ENSURE DRIVER'S SAFETY
BOSTON
POLICE
1854
#_____
ESTE VEHICULO PUEDE SER PARADO Y VISUALMENE INSPECCIONADO POR LA POLICIA DE BOSTON A CUALQUIER HORA PARA ASEGURAR LA SEGURIDAD DEL CONDUCTOR.
BOSTON POLICE TAXI INSPECTION PROGRAM FOR SAFETY

BOSTONPOLICE

DEPARTMENT 1 Schroeder Plaza, Boston, MA 02120-2014

February 15, 2000

Elizabeth Brooks
Stern, Shapiro, Weissberg & Garin
90 Canal Street
Boston, MA 02114-2022

Re: Request for Hackney Carriage Information

Dear Ms. Brooks:

I am writing in response to your request for information regarding the Boston Police Department's Taxi Inspection Program for Safety (TIPS) and the number of hackney carriage licenses (medallions) in the City of Boston. According to the Hackney Carriage Unit of the Police Department, there are currently 1719 licensed taxicabs in the City of Boston and all 1719 licensed taxicabs voluntarily participate in TIPS.

Please feel free to call if you have any questions or would like additional information.

Sincerely,

Jed M. Nosal
Staff Attorney
Office of the Legal Advisor
(617) 343-4550